IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-6593

DANIEL WILBUR GARDNER,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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PRELIMINARY STATEMENT

All references to the appendix will be made by use of the prefix "A" followed by appropriate page number. References to the original transcript of trial testimony

will be made by use of the symbol "Tr." followed by appropriate volume and page number.

Opinion Below

The opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 313 So.2d 675 (A 149-156). The findings of fact made by the trial judge in support of the imposition of the death sentence and the judgment and sentence of the Circuit Court of the Fifth Judicial Circuit of Florida, in and for Citrus County, adjudicating petitioner guilty and sentencing him to death appear at A 138-140.

Jurisdiction

The judgment of the Supreme Court of Florida was entered on February 26, 1975

(A 149). The petition for certiorari was filed on May 24, 1975 and was granted on July 6, 1976 (A 157). The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

This case involves the Sixth Amendment to the Constitution of the United States, which provides:

> "In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes and rules of Criminal Procedure of the State of Florida.

> Section 775.082, Florida Statutes, 1975.
>
> Section 782.04, Florida Statutes, 1975.

Section 921.141, Florida Statutes, 1975

Florida Rule of Criminal Procedure 3.710.

Florida Rule of Criminal Procedure 3.711.

Florida Rule of Criminal Procedure 3.712.

Florida Rule of Criminal Procedure 3.713

Question Presented

Whether nondisclosure of a "confidential" portion of a presentence investigation report to a defendant convicted of a capital crime constitutes a denial of the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States, and of the right to a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment, in a case where the trial judge declines to accept a jury recommendation of a life sentence and instead imposes the death sentence partially on the basis of the presentence report?

Statement of the Facts

Glenda Mae Demney, presently residing in Tampa, Florida, suffered a traumatic experience on June 29, 30, 1973. On that date, she was living in Homosassa, Florida. She lived in a trailer right beside her daughter, Bertha Mae Gardner, and her husband, petitioner, Daniel Wilbur Gardner (R Vol.II, pp. 166, 167). Glenda Mae saw her daughter around 7:00 o'clock on June 29, 1973 (R Vol.II, p. 168). Later, after dark, Glenda Mae and Bertha Mae took Bertha Mae's children to the home of Glenda Mae's youngest son. Glenda Mae and Bertha Mae then went on to the Sugar Mill, a local tavern. Glenda Mae let her daughter out at the Sugar Mill and then went back home (R Vol.II, pp. 169, 170). Later Glenda Mae saw Bertha again when Bertha came to her trailer and said she was

out of cigarettes. This was about 10 or 10:30 p.m., and Bertha remarked that she was going to look for her husband, petitioner Gardner. As far as Glenda Mae knew Bertha had not had anything of an alcoholic nature to drink (R Vol.II, p. 171). On that particular evening, Glenda Mae was keeping company with Calvin Loenacker, more popularly known as Buckshot. Later in the evening or perhaps in the early morning hours, Glenda Mae and Buckshot were in her trailer. She was fixing her lunch for the next morning and sipping along on a beer. All of a sudden, the door, hinges and all, came off and her son-in-law, Daniel Wilbur Gardner petitioner was behind it. He hit Glenda Mae on the side of the face, and she was knocked out (R Vol.II, p. 172). The next morning, Glenda Mae was fixing

some coffee when her son-in-law came over again and said that her daughter, Bertha Mae, wasn't breathing right (R Vol.II, p. 174). Glenda Mae went next door and saw her daughter naked on a bed with bruises on her face. Glenda Mae didn't know if Bertha was unconscious or not. But as far as she could determine, her son-in-law was not drinking that morning and he did not appear to be intoxicated. She stated that he had been drinking the night before when he came to her trailer and struck her but he was not drunk (R Vol.II, pp. 175, 176). No question about it, Glenda Mae flatly denied a contention that her son-in-law came to her house, knocked on the door and inquired about the whereabouts of his children. Glenda Mae further denied that she slammed the door in her son-in-law's face, that he

then kicked the door and it flew open and hit her and knocked her down (R Vol. II, p. 182). Glenda Mae remarked again that her son-in-law knocked her out with his fist and kicked her in the end of her spine "and the door didn't do that." (R Vol.II, p. 183).

Alva Loenecker was a commercial fisherman and long time friend of petitioner Gardner and his wife (R Vol.II, p. 185). He was at Glenda Mae's house on June 29, 1973 drinking some whiskey. At about 11 or 11:30 p.m., petitioner Gardner came over, drug the door off the trailer, came in and hit Glenda Mae and knocked her out on the floor (R Vol.II, p. 186). Buckshot asked him not to do that any more. Petitioner Gardner remarked that he was going back and beat hell out of his wife. Buckshot saw Bertha Mae at the door of

her trailer, and then gesturing, said that petitioner was pulling her head down at which time Bertha said, "please don't hit me any more." (R Vol.II, p. 187) Approximately 35 minutes later, petitioner Gardner returned to the trailer where Glenda Mae and Buckshot were. Petitioner wanted to jump on Glenda Mae again but Buckshot apparently talked him out of it. Nothing was mentioned concerning the whereabouts of petitioner's children (R Vol.II, p. 188). The next morning, petitioner came to the trailer, called Buckshot and said something was wrong with his wife, Bertha Mae (R Vol.II, p. 189). Glenda Mae got up and she and Buckshot went to petitioner's trailer. On entering the trailer, Buckshot saw Bertha Mae and petitioner remarked that he couldn't understand why his wife didn't wake up.

Buckshot said that Bertha Mae looked like she was dead. Petitioner asked him to go call the ambulance (R Vol.II, p. 190).

Nellie Merkerson is the mother of petitioner. She saw Buckshot on the morning of June 30, 1973 and as a result went to the trailer where her son and his wife were living (R Vol.II, p. 196). On arrival at the trailer, she asked her son what had he done, and he denied having done anything at all (R Vol.II, p. 197). After this, Nellie went back to her house, called her daughter-in-law and asked her to call the ambulance. Nellie then returned to her son's trailer and when she saw what had happened and asked her son about it, he said, "She wouldn't tell me where my babies are and I tried to get her to tell me and she wouldn't so I kept on beating her."

(R Vol.II, pp. 198, 199)

David Merkerson is the half-brother of petitioner (R Vol.II, p. 200). David lived about 150 feet from the trailer where petitioner and his wife lived. He went to their trailer on the morning of June 30, 1973. His mother, Nellie Merkerson, his wife Susan, and Bertha's mother, Glenda Mae, were there (R Vol.III, p. 201). Buckshot was outside. When David Merkerson saw Bertha Mae, she was on the bed and "she was dead." A sheet had been pulled up all the way to her neck (R Vol. II, p. 202). David was present when petitioner was placed in the patrol car (R Vol. III, p. 203). At that time, petitioner remarked to him, "Dave, I guess I really did it this time." David answered, "Yes, I guess you did." (R Vol.III, p. 204)

Susan Merkerson is the aunt of petitioner. She lived less than one-half block from where petitioner and his wife lived. Her rest was disturbed at approximately 11:30 p.m. on June 29, 1973 when she was awakened by noises emanating from petitioner's trailer which sounded like someone was bumping or moving furniture around (R Vol.III, p. 206).

Walter Owezarek is an emergency medical technician and on the morning of June 30, 1973 went to the residence of Daniel Wilbur Gardner and Bertha Mae Gardner (R Vol. III, p. 207). Upon arrival, Walter asked where the patient was (R Vol.III, p. 208). Petitioner pointed to a room. Walter saw a woman lying on a bed and examined her but found no vital signs. He looked at her entire body and saw a gigantic hematosa in the pelvic area (R Vol.III, pp. 209, 210).

The woman had been so badly bruised that Walter inquired from the petitioner as to how it happened. Petitioner remarked that his wife probably went out and got some drugs and when she came back she told petitioner to hit her and that he constantly kept pounding on her. When Walter heard this, he called the Sheriff's Department and they all stood by and waited for the officers to arrive (R Vol.III, p. 211). Later after receiving permission from the law enforcement officers, Walter and the ambulance driver removed the body to the Citrus Memorial Hospital (R Vol.III, p. 215).

Lloyd Shelton had been employed as a deputy sheriff of Citrus County, Florida, for approximately 8-1/2 years. On June 30, 1973, he had occasion to go to the residence of petitioner Gardner at

approximately 7:00 a.m. (R Vol.III, p. 216). He had known petitioner and his wife prior to this occasion (R Vol.III, p. 217). When he looked at the nude body which had been beaten and bruised, there wasn't any sign of life. He touched the leg just below the knee, and it was cold. He radioed the sheriff's office to send Deputy Williams and for them to call Mr. Green to come to the scene (R Vol.III, p. 218). Deputy Shelton took a lot of photographs inside the premises (R Vol. III, p. 219). Deputy Shelton turned all the evidence over to Deputy George Hanstein (R Vol.III, pp. 230, 231). Later when Deputy Shelton arrested petitioner, he advised him of his constitutional rights, commonly known as Miranda warnings (R Vol.III, p. 239). After Deputy Shelton put petitioner in the car and they

were driving along, petitioner remarked, "Why would a man do something like that" --"why would I do something like that." Petitioner also commented that his wife had been running around with other people and "that thing has been eating on me,-- it was just more than I could stand." (R Vol.III, p. 240) Petitioner gave a statement to Deputy Shelton and basically in the statement said that he and his wife got into a fuss after they got home and he beat her. Then she got up and took a bath and when she came back to bed, he beat her some more. And then he went to sleep and didn't wake up until the next morning (R Vol.III, p. 243).

David Chancey first saw the body of Bertha Mae at the Citrus Memorial Hospital. He took the body from Citrus Memorial to the Leesburg General Hospital.

No one was with him when he transported the body (R Vol.III, pp. 244, 245). He identified a photograph of the body (State's Exhibit No. 6) as being a photograph of the body he transported.

George Hanstein was a deputy sheriff in Citrus County, Florida. He received three packages from Deputy Shelton which he initialled and processed them for turning over to the Florida Crime Lab in Sanford, Florida. Counsel for the respective parties stipulated to this fact (R Vol.III, pp. 249, 250).

Dr. William H. Shutze is a medical doctor specializing in pathology. Counsel for petitioner at trial had no objection to his qualification as a pathologist licensed to practice in the State of Florida (R Vol.III, pp. 252, 253). Dr. Shutze identified State's Exhibit No. 6

as being a photograph of a body upon which he performed an autopsy on July 2, 1973 at the Leesburg General Hospital. He ascertained that the name of the body of the deceased was Bertha Mae Gardner. This was done from a name tag on the body (R Vol.III, p. 255). Dr. Shutze described the condition of the body and stated that there were at least 100 bruises thereon (R Vol.III, p. 256). And as a result of one injury, it was his opinion that something like a broomstick, bat, or bottle had been placed in the vagina (R Vol.III, p. 257). Dr. Shutze estimated that the wounds were perpetrated upon the body of the deceased by combination of instrument, fists, stomping, and rolling on the floor (R Vol.III, p. 258). The cause of death was a result of a combination of a loss of blood from a large tear in the liver

and from the fracture of the pubic bone (R Vol.III, p. 259). He estimated that the deceased weighed 90 pounds (R Vol. III, p. 260). On examining the body of the deceased, it was determined that large patches of hair were missing that were not of a diseased nature. Rather, the hair loss resulted from same being pulled out (R Vol.III, p. 261). When counsel for petitioner questioned Dr. Shutze, there was quite a hassle over the identity of the body upon which the doctor performed the autopsy. In fact, counsel for petitioner moved to strike all of the doctor's testimony because he could not positively identify the body upon which he performed the autopsy as being the body of Bertha Mae Garnder (R Vol.III, pp. 262-264). A blood alcohol test was performed with a result of

.19 grams percent which Dr. Shutze interpreted as indicating mild tc moderate intoxication (R Vol.III, p. 267).

Chandler Smith worked in the Sanford Crime Lab as a criminalist examiner (R Vol.III, pp. 268, 269). He was qualified as an expert without objection. He testified as to tests performed by him upon certain exhibits and the results thereof (R Vol.III, pp. 270-275).

The petitioner, Daniel Wilbur Gardner, did not take the stand to testify in his own behalf. (A 27-84)

Summary of Argument

Petitioner received a fair trial, and the exercise of a reasoned discretion by the trial judge in the sentencing proceeding does not violate the Due Process Clause of the Fourteenth Amendment. Fail-

ure to disclose a confidential portion of the presentence report did not deny petitioner the effective assistance of counsel nor deny him a fair hearing as guaranteed by the Due Process Clause of the Fourteenth Amendment.

First, for an investigator to get information, especially of an intimate nature, he must be able to give a firm assurance of confidentiality. Mandatory disclosure would immediately dry up sources of information that would otherwise be available to an investigator. People do not want to get involved. When they learn that the supplying of information can result in having to go to court or a neighborhood feud, they will no longer share their knowledge and impressions.

Secondly, mandatory disclosure would interminably delay the proceedings. A

defendant would, and understandably so, challenge everything in the report, thus transforming the sentencing process into a much more lengthy affair then it has to be. If a court must permit controversy with resultant hearings over each part of a presentence report, this would defeat the very purpose of the report by extending the process to such an extent that it would no longer be a practical tool for the aid of the court in the sentencing process.

Thirdly, mandatory disclosure of parts of the presentence report would be harmful to the rehabilitative efforts of a defendant. For example, a psychiatrist would hardly reveal his complete diagnosis of a patient at the beginning of their relationship. Similarly, and particularly if a defendant is to be supervised on pro-

bation by the same officer who compiled the report, it can impede the defendant's progress from the beginning if complete disclosure is made.

Finnally, it is not unfair to a defendant to proceed against him in this manner. There is no longer the scrupulous need for trial-type hearings with full disclosure and confrontation that properly governs a guilt-innocence determination. The reasoned exercise of discretion by the trial judge in evaluating the confidential portion of a presentence report can be trusted and constitutes an adequate safeguard of the interests of both the defendant and society.

ARGUMENT

A. THE SENTENCING PROCEEDINGS MET THE REQUIREMENTS OF DUE PROCESS AND PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Sub judice, the Findings of Fact submitted by the trial judge (A 138) in support of the death sentence proves conclusively that no mitigating circumstances were ignored. A separate and plenary hearing was conducted on the penalty issue as required by Section 921.141(1), Florida Statutes. The jury was correctly instructed as to their duty in this second phase of the trial (A 121), and then the trial judge reread the entire jury instructions to them (A 124). Petitioner made no request for any additional instructions or for any corrections to be made to the instructions as given in this

phase of the trial (A 125, 126). Petitioner was given ample opportunity to present anything he desired for consideration by the jury as a mitigating circumstance. No request was made for the sentencing phase to be continued for the purpose of securing mitigating testimony. Petitioner did not argue in his brief filed in the court below that other mitigating testimony should have been presented to the jury (and the judge) but that he was unable to do so because of lack of time.

The record shows that the jury returned its verdict of guilt on January 10, 1974 (A 106). The second phase or sentencing proceeding was immediately begun and the jury's Advisory Sentence was returned on the same date, January 10, 1974 (A 126). However, the trial judge's Findings of

Fact were not filed until January 30, 1974, and the death sentence was imposed on the same day (A 138-140). Simple arithmetic shows that the trial judge had a period of twenty days within which to mull over, cogitate on, consider, and weigh all of the testimony adduced at the trial and at the sentencing proceeding. Certainly, it cannot be successfully urged that the trial judge was in any haste or in any way eager to impose the death penalty. Rather, this was done after an ample period of reflection and consideration of everything that had transpired and should not be disturbed by this Court.

B. PETITIONER WAS NOT DENIED A FAIR HEARING OR THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF NONDISCLOSURE OF THE FULL PRESENTENCE REPORT.

It must be admitted that the question

of disclosure vel non of the presentence report to parties has generated much heated debate in the literature. See, *e.g.*, Lorensen, *The Disclosure to Defense of Presentence Reports in West Virginia*, 69 W.Va.L.Rev. 159 (1967); Guzman, *Defendant's Access to Presentence Reports in Federal Criminal Courts*, 52 Iowa L.Rev. 161 (1966); Roche, *The position for Confidentiality of the Presentence Investigation Report*, 29 Albany L.Rev. 206; Higgins, *In Response to Roche*, 29 Albany L. Rev. 225 (1965); Higgins, *Confidentiality of Presentence Reports*, 28 Albany L. Rev. 12 (1964); Parsons, *The Presentence Investigative Report Must be Preserved as a Confidential Document*, Fed.Prob., March 1964, p. 3; Thomsen, *Confidentiality of the Presentence Report: A Middle Position*, Fed. Prob., March 1964, p. 8; *Symposium on Dis-*

covery in Federal Criminal Cases, 33 F.R.D 47, 122-28 (1963); Sharp, *The Confidential Nature of Presentence Reports*, 5 Catholic U.L. Rev. 127 (1955); Rubin, *What Privacy for Presentence Reports*, Fed. Prob., Dec. 1952, p. 8; Note, *Right of Criminal Offenders to Challenge Reports Used in Determining Sentence*, 49 Colum.L.Rev. 567 (1949); Hincks, *In Opposition to Rule 34(c)(2), Proposed Federal Rules of Criminal Procedure*, Fed.Prob., Oct.-Dec. 1944, p. 3. There is also a division among statutes on the point. Most maintain a position of silence which is usually interpreted as placing disclosure within the discretion of the sentencing court. Illustrative of this position is Florida Rule of Criminal Procedure 3.713(a) providing that the trial judge "may disclose" any of the contents of the presentence

investigation. It is emphasized that there have been numerous proposals in an effort to draw an acceptable line of demarcation between complete disclosure and complete secrecy. The President's Crime Commission recommended, for example, that "in the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." President's Comm'n, The Challenge of Crime 145. See also President's Comm'n, The Courts 20. Other proposals have often proceeded from the view that what the defendant needs is not the whole report, but merely the facts on which it is based. Sources of information, together with opinions of the probation officer, properly can remain a privileged communication between officer

and judge. See, *e.g.*, Higgins, *Confidentiality of Presentence Reports*, 28 Albany L.Rev. 12 (1964). There are real advantages in a truly confidential report immune from disclosure to the defendant or his counsel. A presentence report, being designed as an aid to the judge, will contain an intimate character sketch of the defendant. In the State of Florida where the reports, at least parts thereof, have been held confidential, they have attained a quality which makes them far more reliable and hence more useful to the judge. No one will deny that in formulating a sentence, a judge needs as accurate an estimate as possible of the character of the defendant. The best source of information on a man's life is his family, if he has one. If the investigating officer can tell the members of the family that any information

they give will be held confidential, the chances are he can get a more accurate picture of the defendant's family life for his report. But if the defendant has been a bad provider and a bad influence on the children, in many cases, the wife will understandably hesitate to disclose the information if she knows that it will subsequently be brought to her husband's attention.

Another very useful source of information includes the defendant's employers. If employers, as a result of full disclosure of the presentence reports, learn that their cooperation in disclosing information to the investigating officer will result in subpoenas to appear and testify on contested issues at hearings on a sentence, this Court can believe that their cooperative attitude will soon

be destroyed. The net result will be that a valuable source of information about the defendant no longer will be available for the presentence report as an aid to the judge in formulating a sentence.

Then, too, the requirement of disclosure seems particularly unfortunate when a defendant is a gangster with dangerous associates. It is neither fair nor sensible for any person who can give useful information on the character of such defendants to be subjected to the hazard of retaliation which well may flow from the disclosure of confidential data.

Frequently, presentence reports will include testimony from neighbors and members of the community. Such information constitutes hearsay and there is perhaps a certain minimal degree of logic in say-

ing the considerations of fairness require that the defendant be given an opportunity to dispute and cross examine any unfavorable testimony gathered by the investigator. But it is the position of respondent that the character and official position of the investigating officer is a better guaranty against unfair prejudice than the opportunity for partisan counsel to verify and cross examine. Probation officers in the preparation of presentence reports are on the alert to discard or discount character evidence motivated by spite or prejudice. Unreliable testimony is either wholly excluded or, if included, accompanied by sufficient warning to put the judge on notice. In this way, the judge has the benefit of information apparently trustworthy and can make his own estimate of the reliabil-

ity of questionable information, just as well as though the objection were raised by defense counsel.

Should this Court determine that full disclosure is constitutionally required, then it can look forward to delays in the imposition of sentence in the trial courts. This is so because defense counsel can urge, and properly so, that the only reason for the rule was to afford opportunity for an independent investigation of certain material found therein and can then protest in all sincerity that their pressing trial engagements will prevent them from promptly undertaking the investigation of the subject matter. And the trial judge will be saddled with an added dilemma: He will be accused of frustrating the rule of disclosure unless he affords defense counsel reasonable opportunity to

verify the report without interference with his court assignments elsewhere. The inevitable result is that the offender whose lawyer is most in demand will have the greater success in delaying the day of sentence.

Respondent's constitutional contention is simply stated: The Sixth and Fourteenth Amendments do not forbid the imposition of a death sentence after consideration of confidential matters in a presentence report that have not been disclosed to the parties. The decision of this Court in *Williams v. New York*, 337 U.S. 241 (1949), has long been recognized as the complete and final word in support of nondisclosure. In *Williams*, this Court reviewed a decision of the New York Court of Appeals and by a majority opinion upheld a conviction of first degree murder. The jury had recommended life imprisonment for the

slaying of a young girl in Brooklyn. The trial judge, relying upon a probation investigation report as a basis for ignoring the jury recommendation, imposed the death penalty. This Court held that the trial judge had full power to rely upon a probation investigation report and this notwithstanding the defendant's contention that his constitutional rights had been violated because he had not had access to the report and the right to confrontation and rebuttal. This Court pointedly remarked that the imposition of the death sentence would not alter the principles of nondisclosure, remarking that:

> "We cannot say that the due process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in this awesome power of imposing the death sentence." *Id.* at 252.

The opinion of this Court authored by Mr. Justice Black contains many noteworthy statements expounding the philosophy of probation acceptable to this Court which is appropriately related to an understanding and appreciation of the issue at hand. This Court recognized that *Williams* presented serious and difficult questions as to the constitutional rights of a defendant at sentencing as well as the rules of evidence applicable to the manner in which a judge might obtain information to assist him in the disposition of a convicted offender. Following references to the need of rigid rules of evidence in a trial to determine the issue of guilt, the court then significantly pointed out:

> "A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory and constitutional limits is to determine the type and extent of punishment

> after the issue of guilt has been determined. Highly relevant--if not essential--to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that the sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."
> *Id.* at 247.

The Court then made appropriate references to the modern changes in the treatment of offenders which make it more necessary than in years past for observation of the distinctions in the evidential procedure in the trial and sentencing process. The expanding use of the indeterminate sentence, and of probation itself, are examples of procedures resulting in an increase in the discretionary powers employed in determing punishment. The Court then

indicated its appreciation of the fact that such procedures give rise to the need for the fullest information possible concerning the defendant's life and characteristics as an aid in the selection of the most appropriate sentence. The Court noted that:

> "The considerations we have set out admonish us against treating the due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more enlightened and just sentence.... *The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder--if not preclude--all courts, state and federal, from making progressive efforts to improve the administration of criminal justice."* (Emphasis supplied.) *Id.* at 250.

It may be argued that the decision in *Williams* did not go to the crux of the

matter of determining whether or not a defendant has a right to examine the presentence report. This argument ignores what the decision in *Williams* represents. It unmistakably represents that the use of confidential information by a trial judge in the imposition of a death sentence violates no constitutional right of a defendant.

If the decision of this Court in *Williams* is distasteful to the proponents of full disclosure, then surely the decision of Judge Holtzoff in *United States v. Durham*, 181 F.Supp. 503 (D.D.C. 1960), cert. denied 364 U.S. 854 (1960), will be even less palatable to them.

> "It is not the practice to permit the defendant or his counsel or anyone else to inspect reports of presentence investigations. Such reports are treated as confidential documents.... In fact, it has been the traditional prac-

> tice even before the system of presentence investigation was introduced for the court to receive information in confidence, which the court might or might not disclose to the defendant, as the court saw fit, that might bear upon the question of what sentence should be imposed. The custom of treating reports as confidential documents is merely a continuation of that prior practice." *Id.* at 503, 504.

The basis of Judge Holtzoff's decision was, of course, this Court's decision in *Williams*. See Footnote 1 appended to the *Durham* decision.

Eight years later in 1968, Judge Carter in *Hancock Brothers, Inc. v. Jones*, 293 F.Supp. 1229 (D.C.N.D. Cal. 1968), held that presentencing memoranda prepared in connection with sentencing of defendants in a criminal proceeding under the Clayton Act should not be made a matter of public record and disclosure

would not be compelled. Note the following:

> "If the confidential nature of a probation report is not protected, a serious curtailment could result in information now made available to sentencing judges. Hoover v. United States, 268 F.2d 787 (10th Cir. 1959); United States v. Durham, 181 F.Supp. 503 (D.C. 1960), cert. den. 364 U.S. 854, 81 S.Ct. 83, 5 L.Ed. 77 (1960); United States v. Greathouse, 188 F.Supp. 765 (Ala. 1960); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962) (Barnes, J., dissenting; Barnet and Gronewold, Confidentiality of the Pre-sentence Report, 26 Fed.Prob. 26 (1962). 'To deprive sentencing judges of this kind of information would undermine modern penalogical procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.' Williams v. People of State of New York, 337 U.S. 241, 249-250, 69 S.Ct. 1079, 1084, 93 L.Ed. 1337 (1949)." *Id.* at 1232, 1233.

In the case of *Hoover v. United States*, 268 F.2d 787 (10th Cir. 1959), the sentence was attacked on the ground that the

presentence report contained many inaccurate and untrue statements and that the defendant was given no opportunity to contradict or rebut them. In disposing of this attack, Chief Judge Bratton, writing for a unanimous court, commented as follows:

> "One further challenge to the judgment and sentence was that the probation service made a presentence investigation and report in the case; that the report contained many inaccurate, untrue, and prejudicial statements; that it was an ex parte investigation; that appellant was not given any opportunity to contradict or rebut the inaccurate, untrue, and prejudicial statements; that they prejudiced the court against appellant; and that in such manner he was denied due process. Rule of Criminal Procedure 32(c)(1), 18 U.S.C., provides that the probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court directs otherwise; and Rule 32(c)(2) provides in presently pertinent part that the presentence investigation shall contain such information concerning the circumstances affecting the behavior of

> the defendant as may be helpful in imposing sentence. The presentence investigation was made and the report submitted pursuant to the rule. And the action of the court in taking into consideration and giving appropriate weight to the information obtained in that manner in determining the kind and extent of punishment to be imposed upon appellant within the limits fixed by law, without affording appellant an opportunity to contradict or rebut statements contained in the report, did not violate due process. Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337." *Id.* at 790.

In the case of *Specht v. Patterson*, 386 U.S. 605 (1967), this Court had an opportunity to repudiate its holding in *Williams* but declined to do so. In *Specht*, this Court condemned the procedure followed by a Colorado state court in sentencing the defendant under the Colorado Sex Offenders' Act to an indeterminate term of from one day to life. The defendant Specht was afforded no hearing

or right of confrontation for the purpose of determining the validity of the conclusions stated in the reports of the psychiatrists. This Court held that the failure to grant such procedural safeguards as a hearing and the right of confrontation violated the due process requirements of the Fourteenth Amendment. In determining the applicability of *Williams*, this Court remarked as follows:

> "We adhere to Williams v. New York, supra; but we decline the invitation to extend it to this radically different situation." *Id.* at 329.

The decision in *Baker v. United States*, 388 F.2d 931 (4th Cir. 1968), is informative. Although there, the sentence was vacated and the cause remanded because of the unusual factual situation, the comments of the Court on the issue of nondisclosure are interesting. Note the following:

> "Fixed practices aside, we must observe that there is no obligation upon the Court to divulge, or any right in the defendant to see, the entire report at any time. See Williams v. State of Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959); Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); F.R.Crim.P. 32(c)(2), supra. Indeed, there could be danger in delivering it to the defendant or his attorney for scrutiny. It could defeat the object of the report--to acquaint the court with the defendant's background as a sentencing guide--by drying up the source of such information. See United States v. Fischer, 381 F.2d 509 (2 Cir. July 24, 1967). To illustrate, the probation officer could be deprived of the confidence of trustworthy and logical informants--persons close to the accused--if they knew they could be confronted by the defendant with their statements. The investigation would then amount to no more than a repetition of the public records--so limited a function as to obviate the need of a probation officer.

* * *

"Of course, the defendant's general conduct and behavior, as well as his reputation in the community in regard to honesty, rectitude and fulfillment of his civic and domestic responsibilities, may be treated in the report. Whether any of such commentary should be released will remain in the discretion of the District Judge. Names of informants, as well as intimate observations readily traceable by the defendant, ordinarily should be withheld lest, to repeat, disclosure cut off the investigator from access to knowledge highly valuable to the sentencing court. It is to be expected of the judge, however, that he winnow substance from gossip." *Id.* at 933, 934.

As recently as 1975, the Fifth Circuit Court of Appeals had occasion to pass on the disclosure issue. There the appellants contended that the District Court erred in denying them access to presentence reports. The record did not disclose what, if any, information in the reports was relied upon by the trial judge. However, appellants urged that the nondisclosure was significant in light

of the disparity of sentences imposed on the two defendants. In rejecting this argument, the Fifth Circuit in *United States v. Horsley*, 519 F.2d 1264 (5th Cir. 1975), remarked as follows:

> "This Circuit has repeatedly held that the decision whether or not to disclose part or all of a presentence report submitted pursuant to Federal Rule of Criminal Procedure 32(c)(2) lies within the discretion of the trial judge. United States v. Arenas-Granada, 5 Cir., 1973, 487 F.2d 858, 859 (per curiam); United States v. Thomas, 5 Cir., 1970, 435 F.2d 1303 (per curiam); United States v. Chapman, 5 Cir., 1969, 420 F.2d 925, 926; Good v. United States, 5 Cir., 1969, 410 F.2d 1217, 1221; United States v. Bakewell, 5 Cir., 1970, 430 F.2d 721, 722 (per curiam). We have also held that even where some errors in the presentence report have come to light and been corrected, the trial judge may properly refuse to disclose the remainder of the report to the defendant for purposes of ascertaining whether further mistakes have been made. United States v. Jones, 5 Cir., 1973, 473 F.2d 293, cert. denied, 411 U.S. 934, 93 S.Ct. 2280, 36 L.Ed.2d 961.

* * *

"The leading Supreme Court case regarding access to presentence reports, Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), has not been overruled. In Williams, the Court sustained a death sentence imposed on the basis of a presentence report, despite a jury recommendation of a life sentence. The Court held that the due process clause does not require that a sentence be based on information received in open court, noting that much of the information relied upon by judges in presentence reports would be unavailable if it were restricted to that given in open court by witnesses subject to cross-examination." *Id.* at 1266, 1267.

The use of a presentence report is an integral part of Florida's sentencing procedure. In *Proffitt v. State of Florida*, ____U.S._____, 49 L.Ed.2d 913, 96 S.Ct._____(1976), this Court put its unmistakable stamp of approval on Florida's capital-sentencing procedures.

"The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or

capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.' Songer v State, 322 So 2d 481, 484 (1975). See also Sullivan v. State, 303 So 2d 632, 637 (1974). The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated eight of the 21 death sentences that it has reviewed to date. See Taylor v State, 294 So 2d 648 (1974); LaMadline v. State, 303 So 2d 17 (1974); Slater v State, 316 So 2d 539 (1974); Swan v State, 322 So 2d 485 (1975); Tedder v State, 322 So 2d 908 (1975); Halliwell v. State, 323 So 2d 557 (1975); Thompson v State, 328 So 2d 1 (1976); Messer v State, 330 So 2d 137 (1976)." *Id.* at 49 L.Ed.2d 913 at 923.

Florida Rule of Criminal Procedure 3.713 is remarkably similar to Federal Rule of Criminal Procedure 32(c)(3). Subsection (a) of the Florida rule provides:

> "The trial judge may disclose any of the contents of the presentence investigation to the parties prior to sentencing. Any information so disclosed to one party shall be disclosed to the opposing party."

See also Subsections (b) and (c). The federal rule at Subsection (c)(3)(A) provides:

> "(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, *but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons;* and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report." (Emphasis supplied.)

Thus, both rules permit the exercise of a reasoned discretion by the trial judge in the disclosure in determining the extent of disclosure of the contents of a presentence report. At this point, the words of Mr. Justice Adkins in writing the majority opinion in *State v. Dixon*, 283 So.2d 1 (Fla. 1973), come to mind.

> "Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting Furman v. Georgia, supra. First, the opinion does not abolish capital punishment, as only two justices--Mr. Justice Brennan and Mr. Justice Marshall --adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of Furman v. Georgia, supra; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes Furman v. Georgia, supra.
>
> "Discretion and judgment are essential to the judicial process, and are present at all stages of its progression --arrest, arraignment, trial, verdict,

and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla. Const., art. IV, § 8, F.S.A., and U.S. Const., art. II, § 2.

"Thus, if the judicial discretion possible and necessary under Fla. Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia, supra, has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest.

* * *

"Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in Furman v. Georgia, supra, can be controlled and channeled

until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." *Id.* at 6, 7, 10.

Much has been said and written on the issue of disclosure versus nondisclosure of the confidential portion of a presentence report. Petitioner's entire brief is based on the premise that because of the failure of the trial judge to *sua sponte* furnish counsel for both parties a copy of the confidential portion of the presentence report he has suffered a grievous denial of his constitutional rights. A reading of petitioner's brief conveys the unmistakable impression that the confidential portion of the presentence report contains gross inaccuracies, misrepresentations, and other distortions of the truth. It is urged that all of these terrible accusations could have been

rebutted and the truth of the matter shown if only petitioner and/or his counsel could have been furnished with a copy thereof. Therefore, respondent has secured a copy of the "Confidential Evaluation" which is the confidential portion of the presentence report that was furnished to the trial judge at the sentencing phase of petitioner's trial. It forms the appendix to this brief.

It is readily apparent that most, if not all, of the material found in the confidential portion is also contained in the non-confidential portion (A 133-137). The truth of the matter is there is nothing in the confidential portion that is not found in the non-confidential part of the presentence report. A fair appraisal of both the confidential and the non-confidential portions of the presentence report compels the conclusion that

failure to furnish a copy of the confidential portion to petitioner did not result in a denial of any of his constitutional rights.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

Robert L. Shevin
Attorney General

By: _____
Wallace E. Allbritton
Assistant Attorney General

APPENDIX "A"

CONFIDENTIAL EVALUATION

Name Daniel Wilbur Gardner Dist. # 42

I. Offense: It is obvious that the subject has received a fair trial. He apparently was under heavy influence of alcohol, which was normal for him. Apparently, he beat his wife to an extreme on this occasion, which resulted in her death. It is possible that the subject did not remember what he did, due to the fact that he was highly intoxicated. He continually showed remorse for what happened, claimed that he did not remember, feels he should not be held responsible for something that he cannot remember.

II. Prior Arrests & Convictions: A check of the subject's record will indicate that he is a drinker, has been arrested several times for disorderly conduct, and fight-

ing. The charge in Ft. Myers on 7-20-60 for investigation of Aggravated Assault was not able to be verified, due to the fact that the time limit involved. It is noted that the records in Ft. Myers are quite sketchy about what happened. The subject volunteered the statement that this attack was the result of his first wife. He stated that they apparently had a fight and she went off with somebody to a trailer. He claims he went by the trailer and heard his wife telling the person to leave her alone. He stated he broke into the trailer, noticed a colored man sitting in the front parlor with no clothes on and his wife in the back room with a white man apparently fighting or arguing. He stated that he took out his knife and

told the colored man to get out of there, and went back to the bedroom he apparently claimed brushed past his wife and cut her with the knife and threatened the other man. He stated this all subsided when the States Attorney saw the disposition of the case and stated that the man had every right to defend his wife, so eventually the charge was dropped. The Other Assault charges on 4-2-70 and 4-21-72, were Assaults and Battery, both being on the subject's wife. It should be noted that these charges were dropped at the request of the wife.

III. Plan: Subject does have an adequate residence and employment plan in Homosassa, but it is felt that this subject is no fit candidate for Probation.

IV. Analysis: Before the Court is a 39

APPENDIX "A"

year old white male who was charged with and found guilty of Murder in the 1st degree.

This offense is the result of the subject apparently under the influence of alcohol, administering a severe beating, both with his hands and feet and objects. Apparently, beat his wife to death over no apparent reason.

This subject has resided most of his life in the Homosassa area, being considered the usual drinker and fighter. His younger life was spent mostly being shifted around from Mother to Boys Home. The subject was more or less to let run on his own, without any supervision. Subject was married twice, the second marriage being to the victim in this case.

APPENDIX "A"

It should be noted that this subject is a heavy drinker, which apparently has governed most of his life. Subject spent a short time in the Air Force, stating that he received a General Discharge under honorable conditions. He stated that he did spend some time in the brig, which was mostly due to drinking and disobeying orders. Subject does have a trade as a carpenter, but apparently only works when he feels too. Florida Power indicated that he had worked on and off for the past five years, but apparently was laid off, mostly due to his drinking. They noted that the subject was not working, two months prior to this incident.

Criminal Record: The subject does possess a fairly long record, most of it due to

drinking and fighting and Assault charges as a result of drinking. It should be noted that the subject in these charges has had at least three times when he has beat on his wife. The subject does possess an Assaultive nature and apparently is aggravated by drinking.

Most of the feelings in this case are against the subject. Police feel that he is an extremely poor candidate for Probation due to his drinking and fighting, also they feel that he should not be allowed on the streets, due to what he did to his wife.

It is the opinion of this supervisor that the jury in this case found a true verdict and the subject had a fair trial, that he would be an extremely poor candidate for

probation.

Respectfully Submitted,

Michael C. Dippolito,
District Supervisor

MCD/kb
1-28-74